

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 35 OF 2019

ELIZABETH KERUBO.....APPELLANT

=VRS=

THE REPUBLIC.....PROSECUTOR

*{Being an Appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 3rd day of
September 2019 in the original Keroka Principal Magistrate’s Court Criminal Case No. 769 of 2019}*

JUDGEMENT

The appellant was charged with Being in **Possession of Alcoholic Drinks contrary to Section 27 (1) (b) as read with Section 27 (4) of the Alcoholic Drinks Control Act No. 4 of 2010**. She pleaded guilty on her first appearance in court and was sentenced to imprisonment for six months with no option of a fine. Being aggrieved she appealed. The gist of the appeal is that her plea was unequivocal.

Through Advocate Momanyi, she contended that she did not have the chang’aa; that she did not understand the language used by the court and that indeed the court record did not indicate the language used; that while she was charged with possession of chang’aa, in the facts it was alleged illicit brew was found in her house and further that the facts read to the appellant did not disclose that she was in actual possession of chang’aa or that she lived in the house alone. Counsel argued that Section 54 of the Alcoholic Drinks Control Act required that an authorized officer get permission of the occupant or obtain a warrant and that it is not clear whether this was done. Counsel further argued that it was not demonstrated that the substance found in the possession of the appellant fitted the definition of alcoholic drinks as it was not subjected to a scientific or forensic examination. He argued that even the nature of the containers in which it was found was not disclosed. Further that in regard to the appellant’s antecedents, the previous conviction was not proved as the prosecution did not disclose the court in which the alleged criminal case number 471 of 2017 was tried. Mr. Momanyi urged this court to find the plea was unequivocal, allow the appeal and set the appellant at liberty.

The appeal was vehemently opposed and Mr. Majale, Learned Prosecution Counsel on behalf of the State urged this court to dismiss it.

I have considered this appeal carefully and my finding is that it has no merit. The proceedings before the trial court were brief and it is indicated that they were conducted in Kiswahili one of the official languages of the court and which, from the appellant’s responses to questions asked of her, she clearly understood. When the charge which accused her of being in possession of 40 litres of chang’aa for sale without a licence was put to her, she admitted it. The facts were then read to her and she again admitted the facts whereupon a plea of guilty and a conviction ensued. Counsel’s argument would have held had she pleaded not guilty and evidence was not adduced to confirm that what she was found with was chang’aa. Whereas **Section 54** of the **Alcoholic Drinks Control Act** requires consent of the occupant or a warrant, the appellant did not allege she did not permit the officers to enter her house.

As for the previous records, she clearly admitted having been charged in Cr. 471/2019 for a similar offence and fined Kshs. 40,000/= in each count. The prosecution was therefore not required to prove the previous conviction as it was admitted. The trial Magistrate took that into consideration in sentencing her to imprisonment for six months. The facts in this case are distinguishable from those in the case of **Hilda Atieno v Republic [2016] eKLR** as there the appellant was charged with “**kangara**” which is not one of the substances prohibited in the Act. Also in that case the facts were recorded as “**facts are as per charge sheet.**” In this case the facts were clearly explained to the appellant in Kiswahili and the essential steps of recording a guilty plea were followed. Accordingly, I find no merit in this appeal and it is dismissed.

Signed, dated and delivered in open court this 23rd day of January 2020.

E. N. MAINA

JUDGE